RHB BANK BHD

v.

YA'ACOB MOHD KHALIB

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
ZAINUN ALI JCA
HASAN LAH JCA
[CIVIL APPEAL NO: D-02-613-2004]
2 NOVEMBER 2007

BANKRUPTCY: *Interest - Claim on principal sum - Whether claim barred by s. 8(2A) of the Bankruptcy Act 1967 - Defendant adjudged bankrupt before coming into force of s. 8(2A) - Whether s. 8(2A) had no retrospective effect - Whether claim should be allowed*

This was an appeal by the plaintiff (the appellant herein) against the decision of the learned judge who disallowed the plaintiff's claim for interest on the principal sum in a charge action against the defendant (the respondent herein). The learned judge was of the view that the plaintiff failed to realise its security within six months from the date the receiving order was made against the defendant as required by s. 8(2A) of the Bankruptcy Act 1967 ('the Act'). As such, the plaintiff was not entitled to the interest on the principal sum. Notwithstanding that the defendant was adjudged a bankrupt on 24 November 1986 before the coming into force of s. 8(2A) on 17 July 1992, the learned judge held that s. 8(2A) applied to the plaintiff.

Held (allowing the appeal)
Per Hasan Lah JCA delivering the judgment of the court:

(1) By virtue of subsection (2) of s. 8 of the Act, the plaintiff had acquired a right as a secured creditor to realise its security when the land was charged to the plaintiff on 29 December 1986. As such, the law applicable to the plaintiff was the law as it was on 29 December 1986. Subsection (2A) which was introduced by the Bankruptcy (Amendment) Act 1992 (Act A827) came into force on 17 July 1992. It could not, therefore, take away the plaintiff's accrued right under s. 8(2) as the amending Act did not clearly and specifically provide that subsection (2A) would have a retrospective effect. It was

A therefore not intended to have a retrospective effect. If read otherwise, it would produce an unjust result as subsection (2A) dealt with a substantive right. (para 10)

Bahasa Malaysia *Translation Of Headnotes*

B Ini adalah rayuan plaintif (perayu di sini) terhadap keputusan yang arif hakim kerana menolak tuntutannya untuk mendapatkan faedah atas satu jumlah pokok dalam satu tindakan gadaian terhadap defendan (responden di sini). Yang arif hakim berpendapat bahawa plaintif gagal memanfaatkan sekuritinya dalam tempoh enam bulan C dari tarikh perintah penerimaan dibuat terhadap defendan seperti yang dikehendaki oleh s. 8(2A) Akta Kebankrapan 1967 ('Akta'), sekaligus menyebabkan plaintif tidak berhak kepada faedah yang dipohon. Begitu juga, walaupun defendan telah diisytiharkan bankrap pada 24 November 1986 sebelum s. 8(2A) berkuatkuasa D pada 17 Julai 1992, yang arif hakim memutuskan bahawa s. 8(2A) terpakai kepada plaintif.

Diputuskan (membenarkan rayuan)
Oleh Hasan Lah HMR menyampaikan penghakiman E mahkamah:

(1) Mengambilkira subseksyen (2) s. 8 Akta, plaintif memperoleh hak sebagai peminjam yang dijamin untuk melaksanakan sekuritinya apabila tanah digadaikan kepadanya pada F 29 Disember 1986. Undang-undang yang terpakai kepada plaintif adalah undang-undang yang wujud pada 29 Disember 1986. Subseksyen (2A) yang diperkenal oleh Akta Kebankrapan (Pindaan) 1992 (Akta A827) mula berkuatkuasa pada 17 Julai 1992. Subseksyen tersebut, dengan itu, tidak boleh mengambil G hak terakru plaintif di bawah s. 8(2) kerana Akta pindaan tidak secara jelas dan spesifik memperuntukkan bahawa subseksyen (2A) akan mempunyai kesan retrospektif. Subseksyen tersebut adalah tidak diniat untuk mempunyai kesan retrospektif. Pentafsiran sebaliknya akan menimbulkan satu keputusan yang H tidak adil kerana subseksyen (2A) berurusan dengan suatu hak substantif.

Case(s) referred to:
Public Finance Bhd lwn. Khaliddin Busu [1998] 3 CLJ Supp 495 HC ***(refd)***
Sim Seoh Beng v. Koperasi Tunas Muda Sungai Ara Bhd [1995] 1 CLJ 491 I *CA* ***(refd)***
Yew Bon Tew & Anor v. Kenderaan Bas Mara [1983] 1 CLJ 11; [1983] CLJ (Rep) 56 PC ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, s. 8(2A)
Public Authorities Protection Act 1948, s. 2(a)
Rules of the High Court 1980, O. 29 r. 1(2B)

For the appellant/plaintiff - James Selvamuthu (Nomaezah Ismail with him); M/s Ong Kok Bin & Co
For the respondent/defendant - Fajrul Shihar Abu Samah & Shamsul Zakri SFC, Official Assignee's Office

[Appeal from High Court, Kota Bharu; Originating Summons No: 24-232-2002]

Reported by Usha Thiagarajah

JUDGMENT

Gopal Sri Ram JCA:

[1] I have read the judgment of my learned brother Hasan bin Lah in draft and I agree with the reasons he has given for allowing this appeal.

Hasan Lah JCA:

[2] This was an appeal by the plaintiff against the decision of the learned trial judge who disallowed the plaintiff's claim for payment of interest on the principal sum in a charge action. We allowed the appeal at the conclusion of the arguments. I now give my reasons for doing so.

[3] The facts of the case were not in dispute. By originating summons the plaintiff applied for an order for sale of the defendant's land which was charged to the plaintiff as a security for an overdraft facility after the defendant defaulted in payment. According to the plaintiff the defendant owed the plaintiff a sum of RM116,774.89 as at 31 July 2002 which was made up of the principal sum of RM20,000 and the interests on the said principal sum. On the date of the hearing of the said originating summons a representative from the office of the official assignee informed the court that the defendant was a bankrupt. The learned judge allowed the application for sale of the charged land but he also decided that the amount due to the plaintiff as a chargee was only the principal sum of RM20,000. He did not allow the plaintiff's claim for the interest on the principal sum by virtue of s. 8(2A) of the Bankruptcy Act 1967.

[4] That s. 8(2A) came into force on 17 July 1992. The defendant was made a bankrupt on 24 November 1986. The plaintiff's originating summons was filed on 30 September 2002. The learned trial judge was of the view that as the plaintiff did not realize its security within six months from the date the receiving order was made against the defendant, the plaintiff was not entitled to the interest on the principal sum. Notwithstanding the fact that the defendant was adjudged a bankrupt before the coming into force of that subsection (2A) the learned judge held that that subsection (2A) applied to the plaintiff.

[5] Before us the learned counsel for the plaintiff submitted that that s. 8(2A) of the Bankruptcy Act was not applicable to the plaintiff as that subsection had no retrospective effect.

[6] The facts of the case clearly showed that the defendant was declared a bankrupt on 24 November 1986. That s. 8(2A) of the Bankruptcy Act came into force on 17 July 1992. The charge over the defendant's land was registered on 29 December 1986 which was after the defendant was declared a bankrupt. The High Court granted the order for sale of the said land on 17 May 2004. Subsection (2) and (2A) of s. 8 of the Bankruptcy Act provide:

> (2) This section shall not affect the power of any secured creditor to realize or otherwise deal with his security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed – nor shall it operate to prejudice the right of any person to receive any payment under or by virtue of the provisions of section 31 of the Employment Act, 1955 of the States of West Malaysia or any corresponding provisions in Sabah and Sarawak.
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> (2A) Notwithstanding subsection (2), no secured creditor shall be entitled to any interest in respect of his debt after the making of a receiving order if he does not realize his security within six months from the date of the receiving order.

On the facts of this case I was of the view that there was merit in the submission of the learned counsel for the plaintiff. It is my judgment that that s. 8(2A), with respect, did not have a retrospective effect. I find support for my view in the decision of the Privy Council in *Yew Bon Tew & Anor v. Kenderaan Bas Mara* [1983] 1 CLJ 11; [1983] CLJ (Rep) 56.

[7] In *Yew Bon Tew*'s case the appellants brought an action in March 1975 for damages for personal injuries sustained by both of them in a motor accident that took place in April 1972 between a motor bus belonging to the respondents and a motorcycle ridden by the first appellant with the second appellant as pillion passenger. Section 2(a) of the Public Authorities Protection Act 1948, which applied provided that action shall not lie or be instituted unless it is commenced within twelve months after the act complained of.

With effect from June 1974, this provision was amended to substitute "thirty six months" for the "twelve months". On 20 March 1975 the appellants issued a writ for damages for personal injuries. The respondents filed a defence in which they pleaded that the appellants were barred from bringing the action by virtue of the Public Authorities Protection Act 1948. The learned trial judge decided in favour of the appellants but on appeal the Federal Court held that the time for the claim in this case was not enlarged by the amending act, which had no application to a cause of action which was barred before the amending act came into operation. The appellant appealed to the Yang di-Pertuan Agong. The Privy Council, in dismissing the appeal, held that an accrued right to plead a time bar, which is acquired after the lapse of the statutory period, is in every sense a right, even though it arises under an act which is procedural. It is a right which is not to be taken away by conferring on the statute a retrospective operation, unless such a construction is unavoidable. In this case the respondent acquired a right when the period prescribed by the 1948 Ordinance expired, and this was not taken away by the 1974 amending Act. At p. 3 Lord Brightman said:

> Whether a statute is to be construed in a retrospective sense, and if so to what extent, depends on the intention of the legislature as expressed in the wording of the statute, having regard to the normal canons of construction and to the relevant provisions of any interpretation statute. The sort of problem which can arise is neatly illustrated by the case of "The Ydun"(3). This was an action by the owners of the barque "Ydun" against the Corporation of Preston. On September 13, 1893 the barque went aground owing to the alleged negligence of the Preston Corporation, which was the port authority. On December 5, 1893 the Public Authorities Protection Act was passed. It came into force on January 1, 1894. It had the effect of curtailing the period of limitation applicable to the institution of proceedings in such an

action from 6 years to 6 months. The position therefore at the date of the accident was that the owners had until September 1899 to issue their writ; but on January 1, 1894, if the Act applied to this cause of action, they had only until March 1894. The owners issued their writ in November 1898. By the time the case reached the Court of Appeal there were two issues, first whether the Corporation had been acting in pursuance of its public duties when the accident took place and was therefore entitled to the protection of the Act; and secondly whether the Act applied to a cause of action which had already accrued when the Act came into force. The second issue was decided against the owners, and was disposed of in the judgments with remarkable brevity for so important an issue. A.L. Smith LJ expressed himself as follows (at page 245):

> The rule applicable to cases of this sort is well stated by Baron Wilde in *Wright v. Hale* [1860] 6 H. & N. 227, 232, namely, that when a new enactment deals with rights of action, unless it is so expressed in the Act, an existing right of action is not taken away. But when the enactment deals with procedure only, unless the contrary is expressed, the enactment applies to all actions, whether commenced before or after the passing of the Act. The Act of 1893 is an Act dealing with procedure only.

Vaughan Williams LJ was to the same effect (at page 246):

> I also agree that the Act is retrospective ... There is abundant authority that the presumption against a retrospective construction has no application to enactments which affect only the procedure and practice of the Courts.

[8] In *Public Finance Bhd. lwn. Khaliddin bin Busu* [1998] 3 CLJ Supp 495 a receiving order was made against a chargor of land ie, the defendant on 17 June 1991 which was before the coming into force of s. 8(2A) on 17 July 1992. The charge over the defendant's land was registered on 29 August 1983. The plaintiff filed the originating summons for an order for sale of the defendant's land on 6 November 1997. One of the issues raised in that case was whether s. 8(2A) was intended to have retrospective effect. Faiza Tamby Chik J, after referring to the decision of the Privy Council in *Yew Bon Tew*'s case, held that s. 8(2A) was not intended to have retrospective effect.

[9] In *Sim Seoh Beng @ Sim Sai Beng & Anor. v. Koperasi Tunas Muda Sungai Ara Berhad* [1995] 1 CLJ 491 the issue was whether O. 29 r. 1(2B) of the Rules of the High Court 1980 applied retrospectively. The Court of Appeal held that it was not retrospective. Gopal Sri Ram JCA at p. 496 stated that:

> In our judgment, the correct test to be applied to determine whether a written law is prospective or retrospective is to first ascertain whether it would affect substantive rights if applied retrospectively. If it would, then, *prima facie* that law must be construed as having prospective effect only, unless there is a clear indication in the enactment that it is in any event to have retrospectivity. Contra, where the written law does not affect substantive rights.
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> We derive support for the view that we have expressed from the decision of the Privy Council in *Yew Bon Tew v. Kenderaan Bas Mara* [1983] 1 AC 553 (also reported in [1983] 1 MLJ 1).

[10] In the instant case by virtue of subsection (2) of s. 8 of the Bankruptcy Act the plaintiff had acquired a right as a secured creditor to realize its security when the land was charged to the plaintiff on 29 December 1986. As such the law applicable to the plaintiff was the law as it was on 29 December 1986. Subsection (2A) which was introduced by the Bankruptcy (Amendment) Act 1992 (Act A 827) and which came into force on 17 July 1992 could not, therefore, take away the plaintiff's accrued right under s. 8(2) as the amending Act did not clearly and specifically provide that that subsection (2A) would have a retrospective effect. It was therefore not intended to have a retrospective effect. To read otherwise it would produce an unjust result as that subsection (2A) deals with a substantive right.

[11] For the reasons indicated, this appeal was allowed with costs. It was ordered that the appellant was at liberty to prove its claim in the estate of the bankrupt. The costs for the appeal was also ordered to be taxed and proved against the bankrupt's estate. The deposit of this appeal was ordered to be refunded to the appellant.

[12] My learned sister, Zainun binti Ali JCA, has seen this judgment in draft and has expressed her agreement with it.